IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JESSIE JOHNSON PLAINTIFF

vs. Civil Action No. 2:97cv118-D-B

HANES HOSIERY DEFENDANT

MEMORANDUM OPINION

Presently before the court is the motion of Hanes Hosiery for an award of monetary sanctions against the plaintiff, Jessie Johnson, and his counsel, the Hon. Gerald Green. Finding that the motion is partially well taken, the court shall grant the motion and sanction Mr. Green for filing and maintaining a legally frivolous action.

. Factual and Procedural Background

The plaintiff Jessie Johnson, *pro se*, instituted suit against the defendant Hanes Hosiery ("Hanes") on or about May 27, 1994 in the United States District Court for the Western District of Tennessee. In that complaint, the plaintiff charged that Hanes terminated his employment in 1992 on the impermissible grounds of race and disability. Upon the presentation by the defendant Hanes of an executed release signed by the plaintiff which covered conduct during the time period complained of, the Tennessee court dismissed the action. Johnson v. Hanes, Civil Action No. 94-2405-M1/A (W.D. Tenn. Aug. 30, 1994) (McCalla, D.J.) (Order Dismissing Cause). Mr. Johnson then obtained representation of counsel, the Hon. Gerald Green. On Mr. Johnson's behalf, Mr. Green unsuccessfully pursued an appeal of Judge McCalla's order dismissing the Tennessee action. Johnson v. Hanes Hosiery, 57 F.3d 1069, 1995 WL 329453 (6th Cir. June 1, 1995) (Opinion and Order Affirming District Court). Mr. Green, apparently pursuant to direction of the Sixth Circuit on the matter, then filed a motion pursuant to Fed. R. Civ. P. 60(b) for relief from judgment. Judge McCalla denied the requested relief. Johnson v. Hanes, Civil Action No. 94-2405-M1/A (W.D. Tenn. Oct. 5, 1995) (McCalla, D.J.) (Order Denying Plaintiff's Motion for Relief From Judgment). To the extent of this court's knowledge,

no appeal was taken from Judge McCalla's October 5 order. Instead, the plaintiff again requested relief from judgment from the Tennessee court, which Judge McCalla again denied. Johnson v. Hanes, Civil Action No. 94-2405-M1/A (W.D. Tenn. Apr. 16, 1996) (McCalla, D.J.) (Order Denying Plaintiff's Renewed and Amended Motion for Relief From Judgment). Mr. Green then filed an appeal on behalf of Mr. Johnson to the Sixth Circuit from Judge McCalla's April 16 order. The Sixth Circuit dismissed this appeal for the plaintiff's failure to timely file his brief with the court. Johnson v. Hanes, Cause No. 96-5724 (Oct. 11, 1996) (Order Dismissing Cause for Lack of Prosecution).

On March 18, 1997, the plaintiff, with Mr. Green as his attorney, filed an action in the Circuit Court of DeSoto County, Mississippi. The plaintiff's complaint in this action charged the defendant with various causes of action arising out of his termination of employment with the defendant Hanes, including charges of discriminatory firing based upon race and retaliation for the filing of a worker's compensation claim. The factual predicate upon which he based his claims was identical to that underlying Mr. Johnson's previous Tennessee action. On June 17, 1997, attorneys for the defendant contacted Mr. Green and sent him a copy of a motion to dismiss which the defendant had not yet filed with this court. Exhibit "1" to Defendant's Motion for Sanctions, Letter dated June 17, 1997. In that letter, counsel for Hanes requested that the plaintiff immediately dismiss the action or face a motion by them for sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. The defendant then timely removed the action to this court on June 23, 1997. On June 27, 1997, counsel for Hanes again contacted Mr. Green by letter, warning Mr. Green that it would seek sanctions if Mr. Johnson did not dismiss his complaint and enclosing a copy of a motion for sanctions not yet filed with this court. Exhibit "2" to Defendant's Motion for Sanctions, Letter dated June 27, 1997. On that same day, Hanes filed its "Motion to Dismiss" with this court, charging that dismissal was appropriate on the grounds of *res judicata* and in light of the release signed by Mr. Johnson. Instead of responding to Hanes' motion to dismiss, Mr. Green sought to withdraw from his representation of the plaintiff in this

matter and filed with this court his motion to withdraw on July 21, 1997. Hanes filed its motion for sanctions with the court on August 1, 1997. This court subsequently granted the defendant's motio this case. Johnson v. Hanes, Civil Action No. 2:97cv118-D-B (N.D. Miss. Aug. 4, 1997). As of this date, the court has not relieved Mr. Green of his representation of Mr. Johnson, and no response to Hanes' motion for sanctions has been filed.

. Discussion

. Sanctions under Rule 11

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) Representations to Court. By presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may ... impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Fed. R. Civ. P. 11. Rule 11 was originally enacted in 1938 to curb tendencies toward untruthfulness in pressing a client's suit. Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1025 (5th Cir. 1994) (citing GEORGENE M. VAIRO, RULE 11: A CRITICAL ANALYSIS, 118 F.R.D. 189, 190 (1988)).

> Rule 11 is designed to "deter frivolous claims and curb abuses of the legal system, thereby speeding up and reducing the costs of litigation." Binghamton Masonic Temple, Inc. v. Bares, 168 F.R.D. 121, 126 (N.D.N.Y. 1996). The imposition of Rule 11 sanctions should be approached with caution and should not be imposed so as to "chill creativity or stifle enthusiasm or advocacy." Binghamton, 168 F.R.D. at 126. A court must employ a standard of objective reasonableness to determine whether or not a Rule 11 violation has occurred. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 548, 111 S.Ct. 922, 931-32, 112 L.Ed.2d 1140 (1991). An argument is frivolous and subject to legal sanctions if, under an objective standard of reasonableness, it is clear that no chance of success and no reasonable argument to extend, modify or reverse the law as it stands exists. Morley v. Ciba-Geigy Corp., 66 F.3d 21,25 (2nd Cir.1995).

Columbia Gulf Transmission Co. v. United States, 966 F. Supp. 1453, 1465 (S.D. Miss. 1997).

"[R]ule 11 sanctions are designed to deter frivolous lawsuits. Sanctions also insure, to a large degree, that victims of frivolous lawsuits do not pay the expensive legal fees associated with defending such law suits . . . . " Granader v. McBee, 23 F.3d 120, 123 (5th Cir. 1994).

In this case, Mr. Green knew or should have known that the filing of this action was an exercise in frivolity. Mr. Green represented the plaintiff in the prior action on appeal to the Sixth Circuit, and should have been intimately familiar with the prior action and its preclusive effect upon an action filed in this court. Likewise, in light of the decisions of the Tennessee district court and the Sixth Circuit, Mr. Green should have known of the binding effect of the release which the plaintiff executed. Mr. Johnson should not have filed this action, and Mr. Green should not have assisted him in doing so. After consideration of all of the relevant factors,[1] the undersigned has no qualms about making a determination that this action was a frivolous one. The court finds that the defendant and the court have properly complied with all the procedural prerequisites for the imposition of Rule 11 sanctions in this cause, and shall sanction Mr. Green for filing and maintaining a frivolous action by awarding attorney's fees and expenses to the defendant.[2] See Merriman v. Security Ins. Co. of Hartford, 100 F.3d 1187, 1191 (5th Cir. 1996) (explaining due process requirements for Rule 11 sanctions).

As to the plaintiff himself, this court finds that it is incapable of imposing Rule 11 sanctions against Mr. Johnson. This matter was legally frivolous, and therefore in violation of the obligations imposed by Rule 11(b)(2). As such, Mr. Johnson himself may not be sanctioned by an award of attorney's fees pursuant to Rule 11. Fed. R. Civ. P. 11(c)(2)(A) ("Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)."). In the opinion of this court, a nonmonetary sanction against Mr. Johnson would not serve to further the purpose of Rule 11 nor discourage future frivolous filings, and therefore this court

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[1] See Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1025 (5th Cir. 1994); Thomas v. Capital Security Services, Inc., 836 F.2d 866, 875 (5th Cir.1988) St. Amant, 859 F.2d at 383.

[2] The court also notes that Mr. Green's attempt to withdraw from representation in this case does not insulate him from sanctions in this matter. St. Amant v. Bernard, 859 F.2d 379, 384 (5th Cir. 1988).

declines to sanction Mr. Johnson in any form.

. Sanctions under 28 U.S.C. § 1927

The defendant also seeks an award of attorney's fees and costs against Mr. Green for violation of 28 U.S.C. § 1927. That statute provides in pertinent part:

> Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (1997). As the court has already determined that sanctions are warranted under Rule 11, the undersigned does not believe that sanctions under § 1927 would be appropriate. Any such award would merely be duplicative of the award made pursuant to Rule 11. Runfola & Assoc., Inc. v. Spectrum Reporting II, Inc., 88 F.3d 368 (6th Cir. 1996).

. Amount of the sanction

. Expenses

Hanes seeks an award of expenses in the amount of $ 408.97. The court has reviewed the claimed expenses and finds that they are reasonable. As such, the full amount of the claimed expenses shall be awarded.

2. Attorney's Fees

In determining the appropriate amount of attorney's fees to award, the court applies the "lodestar" method of computation:

> The "lodestar" is computed multiplying the number of hours reasonably expended by the prevailing hourly rate in the community for similar work. The court then adjusts the lodestar upward or downward depending on the respective weights of the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir.1974).

Longden v. Sunderman, 979 F.2d 1095, 1099 (5th Cir.1992). The twelve Johnson factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions involved;
(3) the skill required to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to the acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) the time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and the length of the professional relationship with the client;
(12) awards in similar cases.

Johnson, 488 F.2d at 717-719. Even though the Johnson factors must be addressed to ensure that the resulting fee is reasonable, not every factor need be necessarily considered. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 331 (5th Cir.1995); Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir.1993) ("rarely are all the Johnson factors applicable ...") (quoting Brown v. Phillips Petrol. Co., 838 F.2d 451, 456 (10th Cir.1988)).

. The Lodestar Amount

) Larry Bridgesmith

As asserted by the affidavit of S. Craig Moore and unchallenged by the plaintiff, Mr. Larry Bridgesmith normally charges his clients an hourly rate of $205.00. Exhibit 4 to Defendant's Motion for Sanctions, Affidavit of S. Craig Moore. Even in light of Mr. Bridgesmith's experience, the court finds that his claimed hourly rate of $205.00 is unreasonable and out of line with the hourly rate charged by comparably experienced attorneys in the northeast Mississippi area. Instead, the rate of $ 125.00 per hour shall be used in the calculation of the lodestar amount for his services as a more reasonable figure. As to the number of hours reasonably expended in the defense of this litigation, the court has reviewed the submissions of Mr. Bridgesmith on the matter and finds that the amount of the claimed hours (7.30) was in fact reasonably expended. Again, the plaintiff has failed to challenge the reasonableness of the claimed hours. The number of hours (7.30) multiplied by the hourly rate ($125.00) results in a lodestar amount of $912.50 for the work performed by Mr. Bridgesmith.

) S. Craig Moore

As asserted by his affidavit and unchallenged by the plaintiff, Mr. Moore normally charges his clients an hourly rate of $150.00. Exhibit 4 to Defendant's Motion for Sanctions, Affidavit of S. Craig Moore. In light of Mr. Moore's experience, the court finds that his claimed

hourly rate of $150.00 is unreasonable, and out of line with the hourly rate charged by comparably experienced attorneys in the northeast Mississippi area. Instead, the rate of $ 90.00 per hour shall be used in the calculation of the lodestar amount for his services as a more reasonable figure. As to the number of hours reasonably expended in the defense of this litigation, the court has reviewed the submissions of Mr. Moore on the matter and finds that the amount of the claimed hours (33.60) was in fact reasonably expended. Again, the plaintiff has failed to challenge the reasonableness of the claimed hours. The number of hours (33.60) multiplied by the hourly rate ($90.00) results in a lodestar amount of $ 3024.00 for the work performed by Mr. Moore.

) E. Farish Percy

As to the work performed by Ms. Percy, the claimed hourly rate is $110.00. The court finds that this rate is an unreasonable one for attorneys with comparable experience in the northeast Mississippi area. Instead, the rate of $ 90.00 per hour shall be also used in the calculation of the lodestar amount for her services as a more reasonable figure Upon review of the unchallenged submissions in this cause, the court finds that the claimed hours were reasonably expended on this litigation. The number of hours (5.25) multiplied by the hourly rate ($90.00) results in a lodestar amount of $ 472.50 for the work performed by Ms. Percy.

. Adjustments to the Lodestar

After consideration of all of the Johnson factors, the court determines that the lodestar amount should be multiplied by a factor of .85, resulting in a downward adjustment to the lodestar amount. Several factors favor a downward adjustment in this case, including:

1) the issues involved in this case, which were not novel or difficult. This factor is particularly important to the court, and is recognized by Mr. Moore in his affidavit in this court;

2) the time and labor required. As the issues were neither novel nor difficult, the amount and intensity of the work required was not quite as great as it might otherwise have been;

) the skill required to perform the legal service properly. While the defense of any discrimination action requires requisite skill and experience, this is reflected in the

hourly rate awarded;

4) the "undesirablity" of the case. From a defense attorney's standpoint, this was indeed a desirable case to defend in federal court. It was a very "winnable" case, in light of the prior rulings in the previous action before the United States District Court for the Western District of Tennessee and the Sixth Circuit Court of Appeals.

Most of the other Johnson factors either do not apply or favor no adjustment in this case. Two additional factors warrant discussion -- 1) the experience, reputation, and ability of the attorneys, and 2) the nature and the length of the professional relationship with the client. The court has taken note of the experience of the attorneys involved in this case, and the court has considered this experience in the calculation of their hourly rates. Likewise, the court is aware of a longstanding relationship between the law firm of Constangy, Brooks & Smith and the defendant, but does not believe that the relationship warrants an adjustment to the lodestar in this case. Reduction of the lodestar amounts by a factor of .85 results in a final calculation of awards to Mr. Bridgesmith, Mr. Moore, and Ms. Percy in the amounts of $ 775.63, $ 2570.40 and $ 401.63, respectively. The claimed amount of expenses remains unchanged by the adjustment to the lodestar amounts.

III. Conclusion

This court finds that Gerald Green filed and maintained before this court a frivolous action in violation of Rule 11 of the Federal Rules of Civil Procedure, and this court shall impose monetary sanctions upon him in the form of an award of attorney's fees to the defendant. As this court has determined that the matter before this court was legally frivolous, this court is without authority to impose a monetary sanction against the plaintiff under the terms of Rule 11. In that it is this court's opinion that a non-monetary sanction would not serve the purposes of Rule 11, the court declines to sanction Mr. Johnson. Finally, as this court imposes a sanction against Mr. Green pursuant to Rule 11, the undersigned declines to sanction Mr. Green for a violation of 28 U.S.C. § 1927. The Rule 11 sanction against Mr. Green is broken down as follows:

Attorney's fees for Larry Bridgesmith	$ 775.63
Attorney's fees for S. Craig Moore	$2570.40
Attorney's fees for E. Farish Percy	$ 401.63
Expense award	$ 408.97
Total Sanction:	$ 4156.63

A separate order in accordance with this opinion shall issue this day.

This the _____ day of October 1997.

United States District Judge

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JESSIE JOHNSON — PLAINTIFF

vs. — Civil Action No. 2:97cv118-D-B

HANES HOSIERY — DEFENDANT

ORDER IMPOSING SANCTIONS

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

) the defendant's "Motion for Sanctions" is hereby GRANTED in part; Gerald Green is hereby SANCTIONED as detailed in this court's memorandum opinion and shall pay as a sanction the amount of $ 4156.63 as an award of attorney's fees and expenses to the defendant Hanes Hosiery.

) as to the remainder of the motion, the defendant's "Motion for Sanctions" is hereby DENIED.

SO ORDERED, this the _____ day of October 1997.

_____
United States District Judge